Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

JOSUE ANAYA AND MARY ANAYA,
HUSBAND AND WIFE
AS PARENTS OF ROSA ARIEL ANAYA,
A MINOR CHILD,

Petitioner,

v.

DOUGLAS COUNTY, NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court in Employment Div. vs. Smith, 494 U.S. 872 (1990), create a hybrid claim exception whereby if a litigant's Free Exercise claim is combined with another Constitutional claim, then strict scrutiny would be the appropriate standard of review?

2. Is strict scrutiny the appropriate standard to apply when such state action burdens a party's First Amendment right to freely exercise his religion along with another Constitutional right such as a right of parents to direct the upbringing of their children?

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JOSUE AND MARY ANAYA, HUSBAND AND WIFE, AS PARENTS OF ROSA ARIEL ANAYA, A MINOR CHILD,

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v.

DOUGLAS COUNTY NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

The Petitioners, Josue and Mary Anaya, respectfully request that a writ of certiorari issue to review the judgment of the Nebraska Supreme Court entered on the 25th day of March, 2005.

OPINION BELOW

The opinion of the Nebraska Supreme Court appears in Appendix A to the petition and is reported at 269 Neb.552 (2005), not yet reported in the Northwest Reporter.

The opinion of the Douglas County District Court of Nebraska appears in Appendix B to the petition and is not published.

A copy of Neb. Rev. Stat. §71-519 appears in Appendix C.

JURISDICTION

On or about March 25, 2005, the opinion and order of the Nebraska Supreme Court, the highest state court in the State of Nebraska, affirmed the Douglas County District Court's order compelling Mr. and Mrs. Anaya to submit their infant daughter to a blood-screening test pursuant to Neb. Rev. Stat. §71-519. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Constitution Amendment I.

Neb. Rev. Stat. §71-519(1), states in pertinent part, "All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotindase, deficiency, and such other metabolic diseases as the Department of Health and Human Services may from time to time specify. Confirmatory tests shall be performed if a presumptive positive result on the screening test is obtained."

STATEMENT OF THE CASE

Josue and Mary Anaya are the parents of eight children. Their eighth child was born on July 11, 2003 in their home and outside the presence of a physician. Mr. and Mrs. Anaya reported the birth of their child on or about July 17, 2003. On or about August 25, 2003, Mr. and Mrs. Anaya received a telephone call and a letter from the Department of Health and Human Services demanding that they submit their child born on July 11, 2003 to a blood test to screen for metabolic diseases pursuant to Neb. Rev. Stat.§71-519. Mr. and Mrs. Anaya did not allow their child to be submitted to the metabolic screening test because of their sincerely held religious belief that life is in the blood and therefore blood should not be taken from the body.

On or about September 25, 2005, Douglas County brought an action against Mr. and Mrs. Anaya in the Douglas County District Court to compel them to submit their child to the metabolic screening test as per Neb. Rev. Stat.§71-519. Mr. and Mrs. Anaya answered said action and raised their right to freely exercise their religion as guaranteed by the United States Constitution, and their right as parents to direct the upbringing of their children.

The District Court of Douglas County Nebraska held that "the parent's religious belief does not outweigh the state's compelling interest that these children can grow and develop to be free of metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel." (District Court order page 6). The case was timely appealed to the Nebraska Court of Appeals and a Motion to By Pass to the Nebraska Supreme Court was granted.

The Nebraska Supreme Court affirmed the Douglas County District Court's order compelling Mr. and Mrs.

Anaya to submit their child to a metabolic screening test. The Nebraska Supreme Court held, "we do not read *Smith* (referring to Employment Div. vs. Smith, 494 U.S. 872 (1990)) as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but other constitutional provisions, the Court did not hold that strict scrutiny is required simply because more than one constitutional right might be implicated." The Court further held, "we conclude that the Anayas' assertion of a hybrid rights claim does not implicate a strict scrutiny review of Neb. Rev. Stat. §71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right."

REASONS FOR GRANTING WRIT

The question presented is whether the strict scrutiny test is applied when a state action burdens the free exercise of religion as guaranteed to the Petitioners under the First Amendment of the United States Constitution combined with another constitutional claim. In Employment Div. vs. Smith, 494 U.S. 872 (1990), the Court indicated that strict scrutiny was applied when a case presented a hybrid claim, i.e. a Free Exercise claim connected with another constitutional claim such as the rights of parents or free speech claim. The United States Courts of Appeals have had occasion to address the issue of hybrid claims in the context of the Free Exercise clause, and there is a conflict as to whether a hybrid claim warrants the application of strict scrutiny test.

Some Courts have acknowledged the hybrid claim warrants the strict scrutiny test when a Free Exercise claim is combined with other constitutional rights violations.

Swanson vs. Guthrie, 135 F.3d 694 (10th Cir. 1998)[1]; Miller vs. Reed, 176 F.3d 1202 (9th Cir. 1999) Cornerstone Bible Church vs. City of Hastings, 948 F.2d 464 (8th Cir. 1991).[2] Other courts, however, have rejected the notion that a hybrid claim warrants the application of strict scrutiny. Kissinger vs. Board of Trustees, 5 F.3d 177 (6th Cir. 1993).

The question of whether the strict scrutiny test would be the appropriate standard of review if a Free Exercise claim is combined with other Constitutional claims has been treated inconsistently in the United States Court of Appeals, leaving an inconsistent precedent for U.S. District Courts and state courts to follow.

As per Rule 10 (b) of the United States Supreme Court Rules, the Petitioners request a writ of certiorari because the state court of last resort in the present case, the Nebraska Supreme Court, has held that a hybrid claim does not trigger the strict scrutiny standard of review, and thus rationale basis is the appropriate standard of review. There is inconsistent precedent in the United States Court of Appeals regarding whether hybrid claims warrant the application of strict scrutiny.

WHEREFORE, for the reasons stated herein, the Petitioner respectfully requests an order granting their Petition for Writ of Certiorari.

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[1] The Court in Swanson noted that the *Smith* opinion does not make it clear whether it is constitutionally sufficient for a law or policy to be neutral and of general applicability, or whether the law or policy will still have to satisfy some lesser standard than the compelling interest test.

[2] The United States District Court for the District of Nebraska rejected the Petitioners assertion of a hybrid claim and the Court of Appeals remanded the case with directions of the Court of Appeals to consider the hybrid claim.

JOSUE and MARY ANAYA,

Petitioner,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

DOUGLAS COUNTY, NEBRASKA, APPELLEE,
V.
JOSUE ANAYA AND MARY ANAYA, HUSBAND AND WIFE, AS PARENTS OF ROSA ARIEL ANAYA, A MINOR CHILD, APPELLANTS.

Case Caption

DOUGLAS CTY. V. ANAYA

Filed March 25, 2005. No. S-03-1446

Appeal from the District Court for Douglas County: Patricia A. Lamberty, Judge. Affirmed.

Amy L. Mattern, of Whitner Law Firm, P.C., L.L.O., for appellants.

Stuart J. Dornan, Douglas County Attorney, Brent Bloom, and Megan Hottman, Senior Certified Law Student, for appellee.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska and Louise and Ray Spiering.

Patrick J. Phipps, of Metcalf, Thompson & Phipps, for amici curiae Children's Healthcare Is a Legal Duty et al.

Filed March 25, 2005. No. S-03-1446.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.

2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.

3. **Civil Rights: Words and Phrases.** The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.

4. **Words and Phrases.** The exercise of religion involves not only belief and profession but the performance of, or abstention from, physical acts.

5. **Civil Rights: Statutes.** The right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.

6. ____: ____. A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

7. ____: ____. A law is neutral and of general applicability if it does not aim to infringe upon or restrict practices because

of their religious motivation and if it does not in a selective manner impose burdens only on conduct motivated by religious belief.

8. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

9. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.

Hendry, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Wright, J.

NATURE OF CASE

The Douglas County District Court ordered Josue Anaya and Mary Anaya to submit their daughter to testing for metabolic diseases as required by Neb. Rev. Stat. § 71-519 (Cum. Supp. 2002). The Anayas appeal, asserting that § 71-519 violates their rights guaranteed under the 1st and 14th Amendments to the U.S. Constitution and that the issue is moot.

SCOPE OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be

constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

FACTS

Rosa Ariel Anaya was born in the Anayas' home, without a physician present, on July 11, 2003. The birth was reported to the Department of Health and Human Services (DHHS) on July 17.

In August 2003, a DHHS employee received Rosa Anaya's birth certificate, checked DHHS' database, and determined that the testing for metabolic diseases required by § 71-519 had not been performed. A certified letter was sent to the Anayas explaining the statute's requirements. Enclosed with the letter was a brochure detailing the screening process, which included drawing a small amount of blood from the heel of the infant to be tested. The Anayas declined to submit Rosa Anaya for the screening, stating that it was in direct conflict with their sincerely held religious beliefs that life is taken from the body if blood is removed from it and that a person's lifespan may be shortened if blood is drawn.

Douglas County brought an action seeking to compel the Anayas to comply with § 71-519. At a hearing on September 26, 2003, Mary Anaya testified as to the Anayas' religious beliefs.

The Anayas subsequently filed a motion for judicial exemption from prosecution and dismissal of the petition. They alleged that it was impossible for them to comply with § 71-519 because 70 days had passed since the birth was registered and DHHS regulations required that the testing be completed within 48 hours of the registration of the birth if

the birth was not attended by a physician. They also claimed the statute violated the 14th Amendment to the U.S. Constitution.

The district court found that the State has a compelling state interest in the screening of infants for metabolic diseases and that the Anayas' religious beliefs did not outweigh the State's compelling interest that "these children can grow and develop to be free of a metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel." The court rejected the Anayas' claim that the issue was moot due to Rosa Anaya's age. Although testing procedures are most effective when administered shortly after birth, the court found that it was not too late to administer the test even if Rosa Anaya was 6 months of age or older. The court ordered the Anayas to comply with § 71-519 by submitting Rosa Anaya for metabolic screening forthwith.

ASSIGNMENTS OF ERROR

The Anayas assert that the district court incorrectly held that the State has a compelling interest which outweighs their First Amendment right to free exercise of religion and their fundamental rights as parents. They also assign as error the court's determination that the issue was not moot.

ANALYSIS

Constitutional Review

The Anayas argue that § 71-519 infringes upon their First Amendment right to freely exercise their religion and that the

district court erred in concluding that the State had shown a compelling interest which justifies the infringement.

[3,4] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The "'exercise of religion'" involves "not only belief and profession but the performance of (or abstention from) physical acts . . . ." *Smith*, 494 U.S. at 877.

The statute which the Anayas challenged provides:

> (1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, medium-chain acyl co-a dehydrogenase (MCAD) deficiency, and such other metabolic diseases as [DHHS] may from time to time specify. . .
>
> (2) . . . If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by [DHHS].

§ 71-519. When Rosa Anaya was born, regulations prescribed by DHHS provided that if a birth was not attended by a physician and "the tests have not been performed within 48 hours of birth as otherwise required by these regulations, the person registering the birth must cause newborn screening tests for metabolic diseases to be

performed within 48 hours of registration of the birth." 181 Neb. Admin. Code, ch. 2, § 008 (2002).

The Anayas argue that because they have raised a free exercise of religion claim along with a parental substantive due process claim, they have a hybrid constitutional rights claim, which requires strict scrutiny review. Under a strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Anayas claim *Smith* held that strict scrutiny is required in cases in which a free exercise claim has been raised along with a claim of violation of another constitutional right.

[5] In *Smith*, the claimants ingested peyote during a religious ceremony and were subsequently dismissed from their employment because Oregon law prohibited use of the drug. The question was whether the state's prohibition was permissible under the Free Exercise Clause. In upholding the Oregon law, the Court stated that it had never held that an individual's religious beliefs excused him from compliance with an otherwise valid law prohibiting conduct that a state is free to regulate. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .'" *Smith*, 494 U.S. at 879, citing *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment).

We do not read *Smith* as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but

other constitutional provisions, the Court did not hold that a strict scrutiny review is required simply because more than one constitutional right might be implicated.

[6] In *Hialeah*, the Court again held that to be found constitutional, a neutral law of general applicability does not require demonstration of a compelling governmental interest. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Hialeah*, 508 U.S. at 531.

Federal courts have also discussed hybrid rights claims. In *Swanson By and Through Swanson v. Guthrie ISD I-L*, 135 F.3d 694 (10th Cir. 1998), the federal court addressed an argument that a school policy violated a home-schooled student's free exercise rights and the parents' right to direct her education. The court stated: "[W]e believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test." *Id.* at 699. "[I]t cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest." *Id.* at 700.

In *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999), the court stated, "[W]e recently held that, to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits.'" The court further stated that "a plaintiff does not allege a hybrid-rights claim entitled

to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Id.* at 1208. See, also, *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002) (court found that case did not present hybrid rights theory).

In rejecting the idea of strict scrutiny analysis for hybrid rights claims, the U.S. Court of Appeals for the Sixth Circuit has stated:

> Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.

Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).

We conclude that the Anayas' assertion of a hybrid rights claim does not implicate a strict scrutiny review of § 71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right.

The second constitutional rights violation asserted by the Anayas seems to suggest that § 71-519 violates their rights as parents to make decisions concerning the upbringing of their children. They rely upon *Pierce v. Society of Sisters*,

268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

In *Pierce*, the Court held that a compulsory education law deprived parents of the right to select a school for their children. It held that the Oregon compulsory education statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. The Court concluded that the challenged law served no state interest and therefore had no reasonable relation to any state purpose.

In *Yoder*, the Court held that a state could not compel Amish parents to require their children to attend formal high school and that the compulsory education law violated the 1st and 14th Amendments. The Court noted that no harm to the physical or mental health of the child was inferred but that when the health and safety of a child was involved, different considerations applied.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* [*v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944),] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Yoder, 406 U.S. at 233-34. The Court did not conclude that strict scrutiny was required.

It is true that "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 2d 645 (1944). However, the Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to a strict scrutiny analysis. See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995). *Pierce* and *Yoder* do not support an inference that parental decisionmaking requires a strict scrutiny analysis.

The question is not whether the Anayas have set forth a hybrid rights claim but whether the law they have challenged is neutral and has general application.

This case is analogous to cases in which courts have upheld the State's right to require immunization of children. In *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), the court upheld the constitutionality of an immunization statute, finding that the free exercise claim challenged a neutral law of general applicability. The law applied to all school children except those whose health would be endangered by immunization. Because the law was neutral, heightened scrutiny was not required even though compulsory immunization might burden a plaintiff's right to free exercise.

The court stated, "It is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that

compulsory immunization is a permissible exercise of the State's police power." *Id.* at 954. Society's interest in protecting against the spread of disease takes precedence over parental rights and the right to free exercise of religion. *Id.*

In *Prince*, 321 U.S. at 166-67, the Court held that

> neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.

[7] A law is neutral and of general applicability "if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by

religious belief[.]'" *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004), quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Section 71-519 is a neutral law of general applicability. It is generally applicable to all babies born in the state and does not discriminate as to which babies must be tested. Its purpose is not directed at religious practices or beliefs. Pursuant to *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), and its progeny, a neutral law of general applicability need not be supported by a compelling governmental interest even though it may have an incidental effect of burdening religion.

Section 71-519 does not contain a system of particularized exemptions that allow some children to be excused from testing. See *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993). The statute does not unlawfully burden the Anayas' right to freely exercise their religion, nor does it unlawfully burden their parental rights. Section 71-519 cannot be construed as directly regulating religious-based conduct. See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). There is no evidence that the State had an anti-religious purpose in enforcing the law. See *id.*

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

We conclude that the effect of § 71-519 upon the constitutional claims the Anayas have asserted is properly analyzed under a rational basis review. Evidence was presented concerning the effects of the diseases that are tested for under the statute. Early diagnosis allows for prevention of death and disability in children. The State has determined that it is appropriate to test for these diseases soon after a child is born in order to address treatment options. The health and safety of the child are of particular concern, as are the potential social burdens created by children who are not identified and treated.

The State has an interest in the health and welfare of all children born in Nebraska, and the purpose of § 71-519 is to protect such health and welfare. This is a rational basis for the law, and it is constitutional.

Mootness

The Anayas argue that the case is moot because the testing was not performed within 48 hours of Rosa Anaya's birth or within 48 hours after the birth was registered. There is no merit to the Anayas' claim. One cannot refuse to comply with testing required within a particular timeframe and then claim that the case is moot because the time has passed.

Although the value of metabolic screening may decline as the child ages, the test results can prove helpful in preventing death or retardation later in development. The program manager for DHHS' newborn screening program testified that some of the conditions occur rapidly after birth and others occur later in childhood. Early diagnosis allows for prevention of death and disability in newborns and children. If a child is not born in a hospital and the testing is conducted outside the 48-hour timeframe, some of the

benefit of treatment is reduced, but further damage can be prevented. It is not possible to determine if a child has any of these conditions by the appearance of the child.

A medical doctor testified concerning the diseases identified in § 71-519. Phenylketonuria, referred to as "PKU," is an inherited metabolic condition due to a genetic absence of an enzyme. The condition creates an abnormal buildup of amino acid that interferes with the growth of nerve cells in the brain, which is critical in the very first weeks and months of an infant's life. Abnormal chemistry is present and can be diagnosed within hours of birth. Any damage occurs within the first few weeks of life, but clear evidence may not be seen until the second half of the first year. Treatment is a special diet that allows children to develop normally.

Hypothyroidism results in a loss of thyroid function and in newborns causes the brain not to develop, resulting in profound mental retardation and developmental delays. An infant with hypothyroidism would not grow well, and the condition would be obvious within a few weeks of birth.

Galactosemia is a condition due to a missing enzyme. Babies without the enzyme quickly become jaundiced and droopy, and they may have a bloodstream infection that kills them within days.

Biotinidase is an enzyme that helps to conserve a B vitamin. A person who lacks the enzyme can develop acidosis, blindness, mental retardation, seizures, and deafness. Treatment is inexpensive and inoffensive. Signs and symptoms of this disease do not manifest early or at a predictable time. A child who is deficient in biotinidase will probably become symptomatic during the first year, and a

child who is partially deficient might become symptomatic during childhood or adolescence.

Hemoglobinopathies can result in diseases including thalassemia and sickle cell disease, which are readily diagnosable and at least partially correctable. Newborns with these diseases are susceptible to bloodstream infections during the first year of life. Symptoms include a low blood count and sometimes an enlarged spleen, which would generally be assessed by a physician.

MCAD, medium chain acyl-CoA dehydrogenase deficiency, is due to the absence of an enzyme that is responsible for burning body fat. MCAD may appear in the first few days or weeks of life or during a childhood illness with fever and vomiting. It can be seen in school-age children. Remedial measures include educating the parents and the child's physician as to the condition and the risks and giving the child a dietary supplement. An episode of severe flu-like symptoms can result in brain damage.

[8,9] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

The issue of whether metabolic screening can be required pursuant to state law is not moot. Were we to determine that the issue of testing is moot because testing has not been completed in the case at bar, we would create a loophole allowing parents to avoid compliance with § 71-519.

The testimony of expert witnesses demonstrated that there is value in testing a child even beyond the 48-hour period immediately after birth. Although some of the conditions would have already manifested themselves, others can develop later in life.

In our review of a question of law, this court has an obligation to resolve the question independently of the conclusion reached by the trial court. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). The record demonstrates that even if metabolic screening is completed beyond the first 48 hours of life, it is still important for the health and welfare of the child. Steps can be taken to treat any condition detected. The district court was correct in finding that the issue is not moot.

CONCLUSION

The judgment of the district court is affirmed.

ORDER of the DOUGLAS COUNTY DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA. (unpublished)

Case Title

DOUGLAS CTY. V ANAYA

Filed on December 19, 2003, Doc.1030 Pg.781

IN THE DISTRICT COURT OF
DOUGLAS COUNTY NEBRASKA

DOUGLAS COUNTY, NEBRASKA, Plaintiff, vs. JOSUE ANAYA and MARY ANAYA, Husband and wife, as parents, ROSA ARIEL ANAYA, a minor child, Defendants.	DOC. 1030 PG. 781 **ORDER**

This matter came on hearing on the petition filed by Douglas County on September 26, 2003 and continued to October 17, 2003, and December 4, 2003, at the request of the defendants, for an order compelling the defendants to comply with certain newborn screening tests for metabolic diseases prescribed in Neb. Rev. Stat. §71-519. In addition,

defendants requested two additional weeks to supplement the record from December 4, 2003, which request was granted. Plaintiff appeared by counsel and defendants appeared pro se on October 17, 2003 and September 26, 2003. Defendants appeared by counsel Amy Mattern and Eric Whitner on December 4, 2003.

The parties have now rested and the Court having reviewed the evidence and the briefs submitted by the parties finds that plaintiff's petition should be granted.

Defendants Josue Anaya and Mary Anaya gave birth to a child, Rosa Ariel Anaya, on July 11, 2003. The child was born at home and not attended by a physician. On or about August 26, 2003, the defendants received a letter from the Department of Health and Human Services advising them they had not complied with the blood screening law. Neb. Rev. Stat. §71-519 provides for newborn screening for certain metabolic diseases. On September 2, 2003, the defendants wrote a letter to the State advising them that due to religious beliefs they were refusing to submit their child for testing for these metabolic diseases.

Douglas County filed a petition on September 24, 2003, and a hearing was held on September 26, 2003, which hearing was continued at the request of the defendant until October 17, 2003, and continued again at the request of the parties until December 4, 2003, and an additional request from defendants for two more weeks to submit a final submission of evidence and/or briefs due by the parties no later than December 18, 2003.

Defendants submit that requiring the defendants to comply with Neb. Rev. Stat. §71-519 would violate their First Amendment rights. The defendants' religious belief is that life is in the blood and that one of the tenants of their faith is that blood should not be taken from the body for any reason. Defendants therefore contend that they cannot comply with the metabolic testing law and adhere to the

tenants of their faith because blood has to be extracted from the body of their baby to perform the tests.

In addition, defendants submit that the case is moot because the issues initially presented in the litigation cease to exist and that the metabolic screening test was not conducted within 48 hours by the person registering the birth as required in Neb. Rev. Stat. §71-519, and the child is now four months old.

Defendants further argue that because their child is healthy and has no symptoms of any disease there is no compelling reason for the State to perform the metabolic tests.

Neb. Rev. Stat. §71-519 requires that all infants born in the State of Nebraska be screened for certain named metabolic diseases within 48 hours after birth including newborn screening for phenylketonuria (PKU). The State has notified the defendants of this requirement, however, defendants have refused to permit their child to be screened for these metabolic diseases.

The fourteenth amendment of the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. U.S Const., amend. XIV, §1.

One of the fundamental rights protected under the Fourteenth Amendment is the right of parents to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion. Those decisions concerning care, custody, and control include, for example, decisions about a child's education, religion, and general upbringing.

The United States Supreme Court has recognized the exercise of one's religion is a fundamental right and when an individual's fundamental constitutional right is being regulated by the State strict scrutiny is the standard of review. In order to pass strict scrutiny, the State may regulate

only if it asserts a compelling State interest, and the regulation is narrowly tailored so that there is a substantial relation between the means of the end.

The challenged regulation must be the least restrictive means of attaining a compelling government interest. Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258 (1997) ; Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1969)..

Although laws cannot interfere with religious beliefs and opinions, laws may interfere with certain practices. The United States Supreme Court has established that the right to practice religion freely does not include liberty to expose a community or the child to communicable diseases or the child to ill health or death. Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438 (1944). If the State passes legislation that affects these beliefs, the manner in which it does so must be narrowly tailored so as to intrude the least amount possible on the complainant's interest. Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963; Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940). When religion and a child's interest are in conflict, the courts have a duty to consider whether religious beliefs threaten the health and well being of a child. Burnham v. Burnham, 208 Neb. 498, 304 N.W. 2d 58 (1981).

In Prince v. Commonwealth of Mass., 3231 U.S. 158, 64 S. Ct. 438 (1944), the United States Supreme Court states as follows:

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. (citations eliminated) . . . Acting to guard the general interest in youth's well-being, the State as paren patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on

religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." . . . The State has a wide range of power for limiting parental freedom and authority and things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." Prince v Commonwealth., supra, at 166-167.

Testing for phenylketonuria at birth is an example of limiting parental freedom due to the State's compelling interest in the child's welfare. Neb. Rev. Stat. §71-519.

Neb. Rev. Stat. §71-519 et seq, does not include a religious exemption.

The purpose of Nebraska's screening procedures is to prevent death or disability in children particularly in newborns as well as to prevent diseases which occur later and can cause death and disability. Upon onset, these diseases are difficult to cure and can result in mental retardation or death, however, a simple blood testing procedure can detect their presence and can implement preventive measures to permanently delay their onset. Plaintiff's experts testified at the hearing that you cannot tell by looking at the child whether or not the child has any one particular metabolic disease.

Defendants also claim that the issue is moot because the child is now four months old. The Court granted at defendants' request continuances to permit them to hire an attorney and an expert in this case. Although the testing procedures are most effective when administered shortly after birth, even if the child is six months or older, the Court finds it would not be too late to administer the simple screening test. In most cases, the administration of these tests

reveal nothing, but in a small percentage of cases where a metabolic disease is discovered there is a very real substantial imminent threat to that child's life.

The Court finds that the parent's religious belief does not outweigh the State's compelling interest that these children can grow and develop to be free of a metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel.

The Court, therefore, finds that plaintiff's petition should be sustained.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants are ordered to comply with Neb. Rev. Stat. §71-519. Defendants specifically are to submit the child Rosa Ariel Anaya forthwith for screening tests for metabolic diseases as prescribed in Neb. Rev. Stat. §71-519 that have not been performed on the minor child.

Dated this 18 day of December, 2003.

BY THE COURT,

/s/
Patricia A. Lamberty
District Judge

§71-519
Statues and Session Law
Chapter 71. Public Health and Welfare
5. Diseases – (c) Metabolic Diseases
71-519 Screening test; duties; disease management; duties; fees authorized; immunity from liability.

(1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, medium-chain acyl co-a dehydrogenase (MCAD) deficiency, and such other metabolic diseases as the Department of Health and Human Services may from time to time specify. Confirmatory tests shall be performed if a presumptive positive result on the screening test is obtained.

(2) The attending physician shall collect or cause to be collected the prescribed blood specimen or specimens and shall submit or cause to be submitted the same to the laboratory designated by the department for the performance of such tests within the period and in the manner prescribed by the department.

If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by the department. The laboratory shall within the period and in the manner prescribed by the department perform such tests as are prescribed by the department on the specimen or specimens submitted and report the results of these tests to the physician, if any, the hospital or other birthing facility or other submitter, and the department. The laboratory shall report to the department the results of such tests that are presumptive positive or

confirmed positive within the period and in the manner prescribed by the department.

(3) The hospital or other birthing facility shall record the collection of specimens for tests for metabolic diseases and the report of the results of such tests or the absence of such report. For purposes of tracking, monitoring, and referral, the hospital or other birthing facility shall provide from its records, upon the department's request, information about the infant's and mother's location and contact information, and care and treatment of the infant.

(4)(a) The department shall have authority over the use, retention, and disposal of blood specimens and all related information collected in connection with metabolic disease testing conducted under subsection (1) of this section.

(b) The department shall adopt and promulgate rules and regulations relating to the retention and disposal of such specimens. The rules and regulations shall: (i) Be consistent with nationally recognized standards for laboratory accreditation and shall comply with all applicable provisions of federal law;
(ii) require that the disposal be conducted in the presence of a witness who may be an individual involved in the disposal or any other individual; and (iii) provide for maintenance of a written or electronic record of the disposal, verified by such witness.

(c) The department shall adopt and promulgate rules and regulations relating to the use of such specimens and related information. Such use shall only be made for public health purposes and shall comply with all applicable provisions of federal law. The department may charge a reasonable fee for evaluating proposals relating to the use of such specimens for public health research and for preparing and supplying specimens for research proposals approved by the department.

(5) The department shall prepare written materials explaining the requirements of this section. The department shall include the following information in the pamphlet:

(a) The nature and purpose of the testing program required under this section, including, but not limited to, a brief description of each condition or disorder listed in subsection (1) of this section;

(b) The purpose and value of the infant's parent, guardian, or person in loco parentis retaining a blood specimen obtained under subsection (6) of this section in a safe place;

(c) The department's procedures for retaining and disposing of blood specimens developed under subsection (4) of this section; and

(d) That the blood specimens taken for purposes of conducting the tests required under subsection (1) of this section may be used for research pursuant to subsection (4) of this section.

(6) In addition to the requirements of subsection (1) of this section, the attending physician or person registering the birth may offer to draw an additional blood specimen from the infant. If such an offer is made, it shall be made to the infant's parent, guardian, or person *in loco parentis* at the time the blood specimens are drawn for purposes of subsection (1) of this section. If the infant's parent, guardian, or person in loco parentis accepts the offer of an additional blood specimen, the blood specimen shall be preserved in a manner that does not require special storage conditions or techniques, including, but not limited to, lamination. The attending physician or person making the offer shall explain to the parent, guardian, or person in loco parentis at the time the offer is made that the additional blood specimen can be used for future identification purposes and should be kept in a safe place. The attending

physician or person making the offer may charge a fee that is not more than the actual cost of obtaining and preserving the additional blood specimen.

(7) The person responsible for causing the tests to be performed under subsection (2) of this section shall inform the parent or legal guardian of the infant of the tests and of the results of the tests and provide, upon any request for further information, at least a copy of the written materials prepared under subsection (5) of this section.

(8) Dietary and therapeutic management of the infant with phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, MCAD deficiency, or such other metabolic diseases as the department may from time to time specify shall be the responsibility of the child's parent, guardian, or custodian with the aid of a physician selected by such person.

(9) Except for acts of gross negligence or willful or wanton conduct, any physician, hospital or other birthing facility, laboratory, or other submitter making reports or notifications under sections 71-519 to71-524 shall be immune from criminal or civil liability of any kind or character based on any statements contained in such reports or notifications.

Source:

Laws 1987, LB 385, § 1; Laws 1988, LB 1100, § 99; Laws 1996, LB 1044, § 502; Laws 1998, LB 1073, § 85; Laws 2001, LB 432, § 10; Laws 2002, LB 235, § 1; Laws 2003, LB 119, § 2.